CONTRACT FOR THE SUPPLY OF INDEFINITE BUSINESS REQUIREMENTS. — A promise by one party to buy all the ice necessary for carrying on his business of ice dealer was, in a recent case, held good consideration for a promise to supply such a quantity at certain prices. *Hickey* v. *O'Brien*, 82 N. W. Rep. 241 (Mich.). The decision is important, for although contracts to meet indefinite business requirements must be frequent, the few cases testing their validity are in conflict. The weight of authority is in accord with the principal case. *National Furnace Co.* v. *Keystone Mfg. Co.*, 110 Ill. 427; *Smith* v. *Morse*, 20 La. Ann. 220. But in some courts the contrary view has prevailed. *Bailey* v. *Austrian*, 19 Minn. 535; *Keller* v. *D'Barru*, 3 Cal. 147.

In *Bailey* v. *Austrian*, *supra*, the leading case in support of the latter view, the plaintiffs agreed to purchase of the defendant all the pig iron they might want in their business during a specified time. The court held the contract invalid, because the plaintiffs did not "agree to want any quantity whatever:" as by discontinuing business they could avoid all obligation, and thus were bound by no positive agreement. In the principal case the court, while rightly differing from this decision, met the objection it offered on the untenable ground that since it must be presupposed that the business would continue, the purchase of some ice was in truth agreed upon. But the promisor made no stipulation to keep up the business, and he was, therefore, at liberty to act so as to incur no obligation to buy. The true test of validity in such a case is not whether the promise made necessary the purchase of some ice, but whether it fettered, or might have fettered, the promisor's conduct? Such clearly was the effect of the present promise. The promisor made an absolute engagement to refrain from buying ice for business purposes from any one but the promisee. His free action was hampered, for he had either to incur an obligation, or to give up his business. Therefore, while the reasoning of the principal case would seem unsound, its conclusion is obviously correct.

The decisions opposed to this view are apparently based on the supposition that a promise to buy whatever materials one may need in business is like a promise to do something entirely at one's pleasure, as, for example, to pay whatever wages one may please or see fit. But the two differ essentially. The latter, unless interpreted to mean performance or payment of what is reasonable, constitutes no true promise. No intention is expressed; no expectation of performance excited. It is in effect a mere statement, under the guise of a promise, that one will do what he will do. A promise like that in the principal case, however, which imposes a restriction on the promisor's free action, affords, as was decided, a perfectly good consideration.

NEGLIGENCE OF A BAILEE IMPUTED TO HIS BAILOR. — Few questions have led to such dispute and confusion as that of imputed negligence. In a recent case a mule, lent by the plaintiff, was injured by the concurring negligence of the bailee and the defendant. It was held that the bailee's negligence must be imputed to the plaintiff and was therefore a bar to his recovery. *Illinois Cent. R. R. Co.* v. *Sims*, 27 So. Rep. 528 (Miss.). The decision is opposed to the true rule of contributory negligence, which denies recovery only where the plaintiff's own negligence, or that of his servant or agent, has contributed to cause the injury. The defendant's

wrong, in such a case, is not lessened, but public policy and justice demand that as long as damages at common law are not apportioned as in the admiralty courts, no one himself causing or responsible for another's causing, his own injury, shall shift the burden of it even upon a party who cannot deny having been in the wrong. The facts of the principal case do not bring it within this rule. The plaintiff was not responsible for his bailee's acts; he could not have been held liable to one whom the latter negligently injured while driving the mule. On principle, therefore, recovery should have been allowed, as the plaintiff was without fault and had been injured by a wrongful act of the defendant, — the fact that another had been equally in the wrong with the defendant furnishing the latter with no excuse.

There are few decisions in point. In one line of cases where a shipper's goods, in the possession of a carrier, have been injured by the concurring negligence of the carrier and a third person, the shipper has been denied an action against the latter. *Arctic Fire Ins. Co.* v. *Austin*, 69 N. Y. 472. These cases are supportable only on the questionable ground that since the carrier is an absolute insurer, public policy should inflict on him the consequences of any loss. It is clear that these decisions, whether sound or not, do not govern the principal case. Two early American decisions, wherein the point received no consideration, support the case under discussion. On the other hand, the New Jersey court, in an able opinion, has recently denied the doctrine of imputed negligence under similar circumstances. *New York, etc. R. R. Co.* v. *New Jersey, etc. R. R. Co.*, 60 N. J. Law, 338. Further, the analogous cases which allow one injured in a hired carriage by the concurrent negligence of the driver and a third person to bring action against either party, point to the same result. *Randolph* v. *O'Riordan*, 155 Mass. 221. Such scant authority as can be mustered to the support of the principal case, coming, as it does, from a time when the doctrine of imputed negligence was much befogged, and being contrary to principle, would seem, therefore, to afford no justification for the decision.

Discharge of Jury on Failure to agree. — The question has recently been raised in an Illinois case as to whether the discharge of a jury by the court without the prisoner's consent, because of its inability to reach a verdict, is a bar to a second trial on the ground of former jeopardy. *People ex rel. Dreyer* v. *Magerstadt*, Circuit Ct., Cook Co., Ill., National Corporation Reporter, April 19, 1900. The court, after an exhaustive review of the authorities, concluded that the state constitution, which declared that no person shall be twice put in jeopardy for the same offence, had not been violated by a second trial of the accused.

There is no doubt that this decision is in accord with the almost universal current of opinion both in England and in the United States, though the contrary view prevails in five or six states. *Com.* v. *Fitzpatrick*, 121 Pa. 109. Nevertheless the general rule is the more modern, and on theory not free from objections. In the first place, it cannot be denied that the accused in such cases as the present has been put in jeopardy by the first trial. There was no defect in the indictment or in the proceedings — nothing to prevent a valid conviction had the jurors agreed. The defendant left his case with them, and would seem to be entitled to a verdict from their mouths. The situation is clearly different from that